

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 74-1663

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1663

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UNITED STATES OF AMERICA

RICHARD J. ROSENBERG

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OF APPEALS  
FOR THE SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES OF AMERICA

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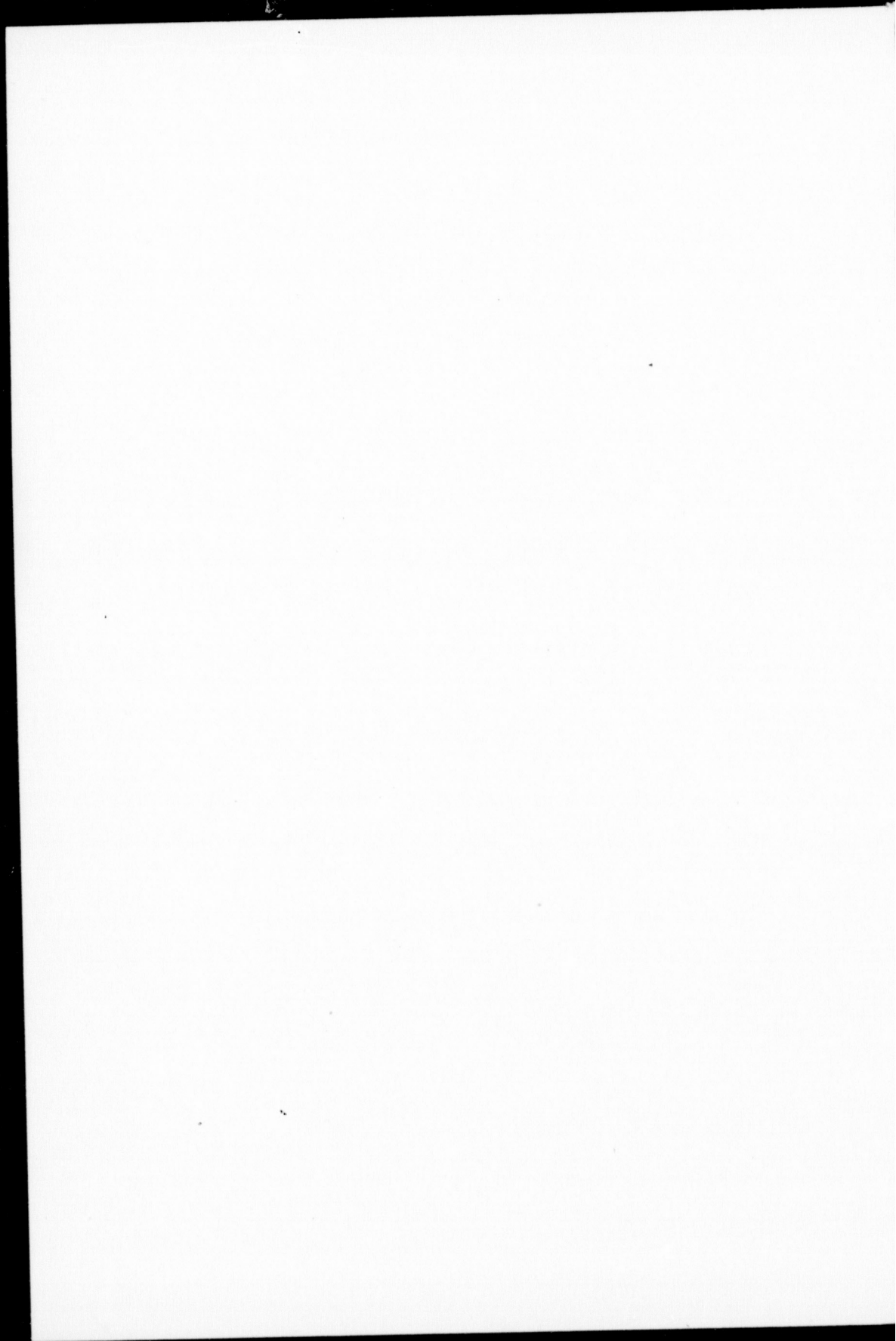
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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 74-1663**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

RICHARD THORNE, a/k/a "OM",

*Defendant-Appellant,*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Richard Thorne, a/k/a "OM", appeals from a judgment of conviction entered on May 15, 1974 in the United States District Court for the Southern District of New York after a six-day trial before the Honorable John M. Cannella,\* United States District Judge, and a jury.

Indictment 73 Cr. 983 filed October 19, 1973 charged Richard Thorne, (hereafter "OM") in Count One with possession of counterfeit plates and negatives and in Count Two with possession of \$114,000 in counterfeit United States currency, in violation of Title 18, United States Code, Sections 474 and 472. Both offenses were alleged to have been committed on or about July 26, 1973.

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\* The indictment was originally assigned to the Honorable Charles L. Brieant Jr. but reassigned when his schedule made him unavailable for the trial.



Trial began on March 25, 1974 and concluded on April 1, 1974 when the jury found OM guilty of both counts.

On May 15, 1974 OM was sentenced to concurrent terms of 3 years imprisonment on each count.

OM is presently serving his sentence.

### **Statement of Facts**

#### **The Government's Case.**

The Government's theory at trial was that OM, spiritual and temporal leader of a group called "OM Lovers", had exercised actual and constructive possession of counterfeit plates and negatives and more than \$114,000 in counterfeit United States currency found in the sixth floor loft at 146 West 25th Street on July 26 and August 1, 1973.

#### **1. The loft.**

Through the testimony of the landlord's agent, Nelson Agis, the Government established that the loft was leased in the name of Sarah Young (Tr. 126). However, the superintendent, Clarence Jefferson, testified that the premises were occupied by a group of people called "OM Lovers", which included the defendant, six women and three children. Jefferson had known OM since July, 1972, and they had seen each other almost daily during the year that followed. (Tr. 45, 58). Jefferson's duties included maintenance and garbage removal, and he was at the building from 7:30 A.M. until 5:30 or 6:00 P.M. and, on occasion, as late as 8:00 P.M. He testified that when he arrived in the morning and when he left in the evening, he would usually see OM in the building. Although Jefferson had never seen the OM Lovers sleeping in the loft, he believed that the defendant and the others lived there.\* (Tr. 46). Furthermore, OM had once

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\* Jefferson had seen sewing machines, chairs, a refrigerator, a stove and blankets in the loft (Tr. 41).

reported to Jefferson that he had surprised an intruder in the building in the middle of the night (Tr. 31).

Although the loft was leased to Sarah Young (a/k/a Claudia Chong or "Lady Harmony"), OM himself arranged for the payment of rent and determined who could visit the loft. In June or July 1973, Nelson Agis attempted to collect \$1500 in back rent. (Tr. 117). Later, the landlord presented OM with a bill for \$6,000 in arrearages. All rent discussions were conducted with OM, who indicated that he would pay at a future time (Tr. 43-44). At that time both OM and Lady Harmony were advised they would be evicted if the past rent was not paid. (Tr. 126).

A few days prior to July 26, 1973, OM instructed Jefferson not to bring anyone to the loft on the freight elevator without explicit orders from OM. The two self-service passenger elevators required keys for entry onto the sixth floor; Jefferson had the job of operating the freight elevator, which was used for visitors without keys. (Tr. 33, 38).

## 2. The OM Lovers.

James Smothers,\* a/k/a "Lord Champion," testified that he had known OM since 1969, when he became a member of the OM Lovers. From 1972 until February 1973, Lord Champion had lived with the OM Lovers in New York. Although he denied at trial that he and OM had lived at the loft on West 25th Street, he admitted that his testimony at the suppression hearing had been correct and truthful. He had testified at that time that OM lived at the loft. (Tr. 64, 65).

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\* Smothers had testified for OM at the suppression hearing (2/13/74 Tr. 63-79).

Lord Champion stated that those who lived with the group were given names by OM: Lady Inspiration, Lady Lovelight, Lady Virtue, Lady Harmony, Lady Truth, Lady Clarity (Tr. 69-70). OM ruled their lives completely, dictating when to rise and retire, what to eat, and what personal habits to adopt. (Tr. 66-67). As the "Supreme Leader," OM had established a chain of command among the OM Lovers, through which he would receive oral and written reports about those whose activities were "out of order," i.e., not in accordance with OM's commands. (Tr. 78-81). In addition, each OM Lover completed a daily activity report which was furnished to OM through channels (Tr. 84). As an example of the hierarchy in the group, Lord Champion testified that OM had placed Lady Lovelight in charge of the New York loft, and she was directly responsible to OM for the OM Lovers' conduct there (Tr. 91).

Among the activities of the OM Lovers were alms collection ("giving every individual the opportunity to be generous"), and operation of a gift exchange program.\* (Tr. 84). Lord Champion's duties included service as a printer, a skill which he had learned by himself (Tr. 135-140). He testified that when he left the group in February 1973, the loft contained the basic ingredients of an offset printing operation: light table, filing cabinet, layout table, camera and printing press (Tr. 72).\*\*

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\* The gift service involved the exchange of goods produced by the OM Lovers or labor instead of money (Tr. 34).

\*\* Lorimer Hecht, an auctioneer, testified that in December 1972 he had sold OM a printing press and light table, among other things (Tr. 178-185; GX 15, 16).



### **3. The discovery of counterfeit currency and related paraphernalia on July 26, 1973.**

On the mornings of July 25, and 26, 1973, Special Agent Guy Caputo and other Secret Service Agents went to the OM Lovers' loft but were refused entry (Tr. 189-191). At about noon on July 26th, Agent Caputo received a box containing counterfeit money (GX 13, 14) from Mrs. Dorothy Michaux, who worked on the fifth floor of the building at 146 West 25th Street and who had found the currency in the ladies' room on that floor (Tr. 166, 167). Upon investigating, Agent Caputo found about \$7,000 in counterfeit currency in the air shaft vents on all floors below the sixth (GX 17-20; Tr. 199, 200, 202-207).

At about 6:30 P.M. on July 26, the agents returned to the sixth floor loft to execute a search warrant (Tr. 195, 196). Lady Harmony, the only OM Lover present, admitted them. (Tr. 196). Agent Caputo observed that the loft premises were divided into rooms, including a library or study area, a temple area, a dark room, a sewing room and an office (Tr. 198). He also saw an area containing two large printing presses, separated by a partition. The smaller press was in the library area; the larger was in an area which contained a vacuum table, a paper cutter, papers, inks, and other printing paraphernalia. (Tr. 197).

Among the items seized by the Secret Service on July 26, 1973 were sample printing papers (GX 21); Hammermill Bond paper similar to that upon which the counterfeit currency was printed (GX 22); a number of books on the running of offset printing machines (GX 23); and two photographs of OM, one showing him posing naked at the printing press with his finger pressing the starter button. (GX 25). Caputo also found cans of ink similar to that used in printing currency (GX 26); a large sample book of blanks for printing stock certificates (GX 28); a large paper cutter (GX 39); and a brochure describing the

"gift service" containing a photograph of the defendant and espousing the demise of the money system (GX 29). The agents also seized considerable heavy equipment (GX 31-38), including a vacuum table, two printing presses, a plate maker, and inks. In a trash can Caputo also discovered the charred remnants of counterfeit notes. (GX 54; Tr. 236).\*

Special Agent Dennis Satterlee, searching the office area, found two counterfeit \$10 bills and about sixty pieces of paper, one bearing handwriting. (GX 91, 91A, 91B; Tr. 302, 311). The pieces of paper were cut to currency size and some had impressions of counterfeit money on one side, the other side being blank.\*\*

#### **4. The seizure of counterfeit currency, plates and negatives on August 1, 1973.**

After securing the premises for the night of July 26, 1973, the Secret Service Agents departed. They removed all of the evidence found during the search, except for the printing presses and vacuum table, and on July 27th the locks were changed. (Tr. 237-238). On August 1, 1973, Agents Sheafe, Caputo and Simon returned to the loft to determine how to remove the heavy equipment.

While examining the plywood partition which divided the area containing the two printing presses, Agent Caputo saw a roll of paper in the crevice between the plywood

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\* The agents also found birth certificates, passports, check-books and Social Security cards of various OM Lovers, as well as many items relating to the OM Lovers' business (GX 30, 40; Tr. 235-236).

\*\* Government's Exhibit 91A, one of the currency-size pieces, contains the words, "no peace without surrender, inferior religions hearken," which OM later conceded he had written (Tr. 417).

sheets, and he extracted the paper from some cement which was still in powdered form (Tr. 242). The paper bore the impression of counterfeit fifty and one hundred dollar bills, all in uncut form. (Tr. 242). After this initial discovery, the agents dismantled the smaller side of the wall, uncovering more than \$100,000 in counterfeit currency, both cut and uncut. In addition, the wall contained approximately 61 printing negatives and 57 printing plates used in the manufacture of counterfeit money. (GX 55-90; Tr. 242).

## **5. OM's fingerprints and handwriting on items found in the loft.**

Tankard G. Evans, a qualified fingerprint expert employed by the Secret Service, identified fingerprints on two of the printing plates found in the loft as OM's. (GX 68, 70, 101; Tr. 429). In addition, Evans found OM's right thumb print on one of the cut currency-size pieces of paper which had been found in the file cabinet in the loft (GX 91; Tr. 429).\*

Edwin Alford, Chief Document Examiner of the Secret Service, testified that the handwriting on a currency-size piece of paper (GX 91A) was "very probably" OM's (Tr. 402).\*\*

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\* The defendant stipulated that the prints were his, and contested only the length of time they had been on the various items (Tr. 436). In that regard, Evans testified on cross examination that he was unable to determine how long the fingerprints had been on the exhibits, or whether they had been made before or after the prints of other OM Lovers which were also found on the items (Tr. 432, 435).

\*\* The defendant conceded that he had authored the statement, but claimed that it had been placed on the paper by mechanical means (Tr. 418). However, Mr. Alford testified that in his expert opinion the writing had been placed on the paper by "something similar to a pen, that type of instrument, as opposed to a printing process" (Tr. 419).

## 6. OM's flight and concealment.

OM was arrested by Special Agent Sheafe on October 6, 1973. At the time of his arrest, OM had in his possession \$710 in traveller's checks in the name "Jeffrey Zeigler". He also had four credit cards in the name "Julius Getman," with Indiana addresses; two blank checks on an Indiana bank, imprinted with the names, "Roberta Getman" and "Julius Getman"; a savings deposit ticket for the same bank, in the name "Roberta Getman"; an Indiana driver's license in the name "Roberta Getman"; a Social Security card and food store check-cashing card in that name; a cashier's check from "Joy Song" to "Julius Getman" at a Chicago address, dated September 25, 1973; and a bill for 1000 business cards, dated October 2, 1973, from a Newark, New Jersey printing company, addressed to "Julius Getman, Holiday Inn, Broad Street, Newark, N.J." In addition OM had handwritten notes concerning visas to Mexico. (GX 96).\*

Joseph Urbansky, a desk clerk at the Newark Holiday Inn, identified the defendant OM as the man who had been registered at the Inn from October 1-6, 1973, in the name "Julius Getman." (GX 12; Tr. 161-164).

## 7. OM's admissions.

Following his arrest on October 6, 1973, OM was interviewed by Special Agent Sheafe (Tr. 322). OM stated that he still had two thousand dollars in counterfeit bills which he would turn over if he were released (Tr. 323-324). Sheafe stated that he could not let him go and that he wanted to know where the fugitive OM Lovers were located. OM replied that he could advise Sheafe where some of them

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\* OM also had two credit cards in the name "Wayne Wilson," a matchbook from Chicago, two airport locker keys, and various business cards.



might be found but that he did not know exactly where they were. He revealed that he had been in California, Chicago and other places between July 26, and October 6, (GX 95). He further admitted that he had helped the women OM Lovers dispose of counterfeit money at the loft in New York on the evening of July 25, 1973 and that his fingerprints might have gotten on the printing plates at that time (Tr. 325-326). OM stated that Lady Inspiration had thrown the counterfeit money down the air-shaft that evening and that all of the women had assisted in hiding the money in the wall. (Tr. 326). OM also said that Lady Lovelight (Mary Lund) had told him in Chicago that she had printed the money and that Lady Virtue (Patricia Fenili) had the ability to make the plates. (Tr. 326, 326a). In addition, OM stated that he had intended to surrender when school started so that a "movement" could be formed to assist in his defense, and that he was using the name "Julius Getman" to avoid arrest.\*

## **The Defense Case.**

### **1. Lord Bliss.**

John Simon, whom OM had named "Lord Bliss," testified that he had known OM for about five years, having met him in New York (Tr. 464). As an OM Lover and overseer of the OM community in Cambridge, Massachusetts, his principal activity was alms collection, the proceeds of which were returned to OM, "the Overlord." (Tr. 465). Lord Bliss claimed that OM Lovers were taught not to commit crimes. (Tr. 470-471). Those who did commit crimes "unendorsed by the rules of the community and OM" would be summarily dismissed from the OM Lovers. (Tr. 469). Lord Bliss also denied that OM had ever admitted any interest in counterfeiting (Tr. 471). He claimed that OM was in Massachusetts from July 1 to 23, 1973. Finally,

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\* OM's admissions were for the most part tape recorded (GX 95).

he testified that everything done by OM Lovers was done for OM's benefit and glory, and that if directed to do so, he would "run a red light" for OM. (Tr. 482-483).

## **2. Lady Harmony.**

After her request for a moment of prayer was denied, Claudia Chong, a/k/a "Lady Harmony," "Sarah Young" or "Joy Song," testified that she had "been knowing OM since I was brought onto this planet" but had been an OM Lover only since 1968 (Tr. 486). Her devotion was such that if OM told her to break a law she would do so, but she indicated that he had never told her to do anything illegal, including counterfeiting. (Tr. 487-488). In addition, she stated that if she observed illegal behavior by another OM Lover, she would reprimand the violator on the spot and then report the matter to the overseer of the household, the defendant's appointed representative in the community of OM Lovers. (Tr. 525).

Lady Harmony admitted that she had signed the lease for the sixth floor loft at 146 West 25th Street, in the name "Sarah Young." (Tr. 504). She stated on cross-examination that in July, 1973, a number of OM Lovers had lived at the loft, and that others had lived at the University Hotel (Tr. 526). She testified that she had seen OM in the loft two or three days before July 26th, and that the office in the loft belonged to all of the OM Lovers, but especially to Lady Lovelight, who was "head of the household". (Tr. 504, 529). As to the "graphic arts area" which contained the printing presses, Lady Harmony testified that Lady Lovelight had sublet that portion of the loft in May 1973 to two men named "Gigi" and "Pico". (Tr. 502). She testified that the men had restricted that area and would not allow the OM Lovers to enter. Although she saw them almost daily until they vacated the premises on July 10, 1973 (Tr. 534), Lady Harmony did not engage them in conversation beyond an oc-

casional greeting, "Om Eternal." (Tr. 508). Although she denied any knowledge of counterfeiting or printing, Lady Harmony admitted that on June 26, 1973, she had written a check to pay for a rubber blanket for the printing press, claiming that she was "probably unconscious of [writing] it." (Tr. 538).

When the Secret Service agents had first come to the door of the loft on July 25th, Lady Inspiration, another OM Lover, had refused to admit them. (Tr. 491, 492, 494). At that time OM was in Staten Island in the OM Lovers' trailer (Tr. 493), where Lady Harmony went to summon him after the agents had left the loft door (Tr. 512). OM returned with her to the loft that night and remained in the temple area for about a half hour (Tr. 514). During that time, Lady Harmony found some counterfeit money in the bathroom and showed it to OM, who was very much displeased and threw the notes in her face. He then stormed from the loft, ordering Lady Harmony to get the "garbage" out of the temple. (Tr. 513). At that point Lady Harmony decided to burn the notes she had found rather than summon the police. (Tr. 513).

Although Lady Harmony did not see OM for several months after that night, she did write to him as "Julius Getman", signing the name "Joy Song." (Tr. 535). She also tried to obtain a false passport for OM in the name "Julius Getman." (Tr. 536).

Lady Harmony testified further that she would never lie to protect OM because only the truth could protect him. (Tr. 538). She also indicated that OM was the father of her child (Tr. 535), and that if he told her to jump out a window she would do so. (Tr. 487, 538).

### 3. Lady Virtue.

Patricia Fenili, a/k/a "Lady Virtue", testified that she had been an OM Lover for five years. She explained in detail the twelve-tiered OM Lover heirarchy (Tr. 543-544), as well as the various grades in which one could serve. (Tr. 568). Lady Virtue testified that she had been the second-in-command among the five OM Lovers serving at the loft in New York in July 1973 (Tr. 545). She also recalled that two men named "Rico" and "Gigi" had rented part of the loft from Lady Lovelight (Tr. 559).

According to Lady Virtue, "Rico" and "Gigi" had framed the OM Lovers by producing counterfeit money in the loft. She claimed that "through the wall" she had heard them say, "Okay, now we have finished our job. We can leave now. We have set them up real good." (Tr. 559) Shortly thereafter, Lady Lovelight showed her some counterfeit money, plates and negatives hidden in different parts of the area which had been rented (Tr. 557). Lady Lovelight told Lady Virtue to destroy the items, and on about July 20th or 21st Lady Virtue burned some of the bills and placed the remainder with the plates in the wall, covered with cement which she poured in from the top. (Tr. 548-549, 586, 587).

Although she had placed the bulk of the counterfeit money and apparatus in the wall, Lady Virtue kept about \$100-120 in bogus \$20-bills and went to New Jersey to visit her parents. (Tr. 549, 580). There, in Atlantic City, she was arrested when she passed two of the counterfeit bills. (Tr. 549). She testified that at the time of trial she was in jail because she had been falsely accused of bail jumping and passing counterfeit money in a New York church but admitted she had been convicted of those crimes. (Tr. 561, 587).\*

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\* On March 21, 1974, after a three-day bench trial before the Honorable Morris E. Lasker, United States District Judge, Patricia Fenili, a/k/a "Lady Virtue" was found guilty of passing two counterfeit Federal Reserve Notes at St. Patrick's Cathedral bookstore on July 18, 1973, and bail jumping.



On cross-examination she denied that her counterfeit passing had been at OM's direction (Tr. 581). In addition, although she knew how to operate a printing press, she denied that the OM Lovers had been involved in counterfeiting. (Tr. 566, 574).

Lady Virtue also testified that while on bail in New York she had fled to Chicago, where she joined Lady Lovelight and other OM Lovers (Tr. 587). There she had used an assumed name to obtain employment, and later traveled to Mexico under the name "Gustavia Abelman." (Tr. 589). She claimed that she had taken the trip at the behest of Lady Lovelight in order to keep OM's children with her. In this regard, she testified on direct examination that she had two children by OM and that he had the power to engage in "sacred erotic communion" with two OM Lovers simultaneously in two different rooms (Tr. 563, 566).

Finally, Lady Virtue testified that if the defendant had told her to counterfeit she would have, but that he had not done so (Tr. 573, 574). She also stated that she believed that *all* money was counterfeit. (Tr. 578).

#### 4. Lady Truth.

Nancy Lee Naylor, a/k/a "Lady Truth" had been an OM Lover for more than four years (Tr. 602). She testified that she had been in the loft in New York and had seen "Gigi" and "Rico" there on numerous occasions. (Tr. 604). A sewing devotee, she was restricted from using the printing area while the two men were there. (Tr. 604, 605). She claimed that the OM Lovers had not engaged in counterfeiting. (Tr. 609). Lady Truth also testified that the office area of the loft was Lady Lovelight's and that a visitor had to remove his shoes before entering because it was sacred: OM's spirit had been invoked there, and his teaching was there. (Tr. 630). According to Lady Truth, although OM never slept at all, the OM Lovers rotated be-

tween sleeping on mattresses at the loft and the trailer in Staten Island (Tr. 616, 618). In her description of the loft, on cross examination she revealed that conversations could not be heard through the partitions between the various areas (Tr. 623). Lady Truth denied having hidden any counterfeit currency in the loft.

### **5. Lord Wisdom.**

Jeffrey Zeigler, a/k/a "Lord Wisdom" had only been an OM Lover for slightly more than a year. (Tr. 634). During July, 1973, he was in Chicago learning a trade, and was not in New York at all that year (Tr. 636). He testified generally concerning the OM Lovers' lifestyle and operations. He also stated that the defendant had often told him the counterfeiting was "unlucrative and also too petty for OM." (Tr. 640).

### **6. Lady Reflection.**

Marilyn Ornelas, a/k/a "Lady Reflection", an eight-year OM Lover, had seen the defendant during May and June 1973 in "Galaxis" (Berkeley, California) but not since. (Tr. 671, 677). She testified that it was not normal for OM to be engaged in counterfeiting (Tr. 674-676).

### **7. Lady Inspiration.**

Ellen McSweeney, a/k/a "Lady Inspiration," had been an OM Lover for about three years. (Tr. 681). Her testimony paralleled that of Ladies Harmony and Truth concerning life at the loft and the activities of "Rico" and "Gigi" (Tr. 683-697). Indeed, she suspected that Rico and Gigi were Secret Service Agents who had tried to break up the OM Lovers' community (Tr. 696). Like the other OM Lovers who testified, she denied having invented "Rico" and "Gigi" in order to exonerate OM. Further, she claimed that until the date of trial she had not told OM about the two men. (Tr. 698).

Lady Inspiration admitted that she had emptied a bag of counterfeit notes down the air shaft at the loft on the night the agents sought permission to enter without a warrant (July 25, 1973). (Tr. 685, 686). In addition, she claimed that OM had surrendered to the New York City Police on July 26th but that he had been released because they were not looking for him. (Tr. 713). Thereafter she saw OM in Chicago, where they met Lady Lovelight, but had no discussion about counterfeiting. (Tr. 716).

### **8. OM's Fingerprint Expert.**

The only defense witness who was not an OM Lover was Robert E. Martin, a document examiner and fingerprinting expert. Martin stated that a fingerprint was more likely to have gotten on a printing plate during the hot weather of May, June, and July than at any other time of the year and that there was no way of determining how long a fingerprint would remain on a given surface. (Tr. 664). On cross-examination he stated that the more an object is handled the less likely it is that fingerprints would remain on it. (Tr. 668).

## **ARGUMENT**

### **POINT I**

**The defendant's motion to suppress was properly denied.**

Prior to trial, OM moved under Rule 41(f) of the Federal Rules of Criminal Procedure for an order suppressing statements he had made at an interview with Secret Service Agent Sheafe following his arrest on October 6, 1973, and evidence seized on August 1, 1973 from the sixth-floor loft premises at 146 West 25th Street. The motion was denied by Judge Bricant on March 21, 1974. (Memorandum and

Order, 73 Cr. 983). OM now argues that the motion was improperly denied and that the statements and evidence introduced against him at trial should have been suppressed.

### **1. OM's Post-Arrest Statement.**

OM was arrested by Special Agent Sheafe at 2 Fifth Avenue, New York City on October 6, 1973 (2/8/74 Tr. 8). At that time, Sheafe advised OM that he had been arrested for violation of the counterfeiting laws and instructed him not to say anything. (2/8/74 Tr. 9). OM was turned over to two other agents for transportation to the Secret Service Office. They were instructed that no one was to interview OM until Sheafe arrived at the office but that OM was to be fingerprinted and photographed. (2/8/74 Tr. 9, 10).

At the Secret Service Office, Special Agent Ott advised OM that he had been arrested for counterfeiting and that he was going to be processed (photographed and fingerprinted) at the office. Ott asked the defendant if anyone had read him his rights. When OM replied that one of the agents had done so in the car, Agent Ott began the processing. However, OM began a monologue about counterfeiting, which Ott interrupted:

"After I informed him that he would be processed by the Secret Service, I began, gave him his rights again and I said that he would, anything he said could be held against him, that he had the right to remain silent, that he had the right to a lawyer and if he couldn't afford one, one would be provided for him. He said he understood that and he began talking about counterfeiting again.

"I told him that my boss had instructed me to expedite the processing and that he would have the opportunity to speak to an agent if he so desired in a few minutes." (2/8/74 Tr. 36)



Agent Ott testified further that he had given OM a standard Secret Service Form 1737, which contained a rights warning and waiver (GX 10). OM read the form, said he understood, and signed the "warning" portion. Agent Ott inadvertently signed his own name to the "Waiver." When he realized what he had done, Ott crossed out his signature and signed the form in the proper "witness" space. He showed the form to OM, who indicated again that he understood his rights as well as the waiver. OM was not asked to and did not sign the waiver of the form. (2/8/74 Tr. 38, 44).

After Agent Ott had performed the initial processing steps, he took OM to an interview room, where Special Agent Sheafe was waiting to question him (2/8/74 Tr. 11). Sheafe again advised OM of his identity and the reason for OM's arrest, and read the *Miranda* warning to OM from the Form 1737 which OM had signed. The defendant said that he understood his rights and that he did not object to being interviewed concerning the violations for which he had been arrested (2/8/74 Tr. 12). Moreover, OM offered no objection when asked if he would mind having the interview taped.

After the interview had been in progress for about a half hour, Agent Sheafe noticed that the portable recorder was not recording. Accordingly, he advised OM that they would begin the interview again in order to have it recorded properly. Throughout this procedure, OM willingly answered questions, did not request that the interview be terminated, and never asked for the assistance of a lawyer. (2/8/74 Tr. 13).

On these facts Judge Bricant found "... beyond a reasonable doubt, that the statements or admissions sought to be suppressed were voluntarily made after defendant had been fully advised of his constitutional rights, and

after a knowledgeable waiver as aforesaid." (Memorandum and Order at 4-5).

OM claims on appeal that the Government must somehow be bound by the fact that he did not sign the "waiver" portion of the Form 1737,\* although he had signed the "Warning of Rights" portion of the form. He argues that his failure to sign the waiver was a "deliberate and conscious attempt for him to preserve his rights." (Appellant's Brief at 6). That argument is without merit and is wholly unsupported in law and in fact.

The uncontroverted facts established below are that after having been given his *Miranda* warnings three times OM chose to waive his rights and made a lengthy statement. The claim that his failure to sign the waiver "could clearly have been construed as a *specific intent not to waive his rights*" (Appellant's Brief at 4; emphasis in original) simply is not borne out by the facts. There is no evidence whatsoever that OM was misled by the agents, nor that he "may well have been laboring under the belief, rightfully, that because he had not signed the waiver of his rights he was still maintaining them and that all of his conversations could not in fact, be used against him." (Appellant's Brief at 4). That argument reflects utter conjecture unsupported by the facts established at the suppression hearing. The defendant did not testify or present evidence on this issue, although he could have done so without later jeopardy. *Simmons v. United States*, 390 U.S. 377, 394 (1968); *United States v. Capra*, Dkt. No. 74-1068 (2d Cir. July 26, 1974) Slip op. at 4991 n. 3. Indeed, OM offered no affidavit to support his contention that his statement was involuntary.

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\* "I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or force of any kind has been used against me. I hereby voluntarily and intentionally waive my rights and I am willing to make a statement and answer question." (GX 10).

See *United States v. Yanishefsky*, Dkt. No. 74-1117 (2d Cir. July 30, 1974), Slip op. at 5052-5053.

Significantly, the defendant cites no legal authority for the proposition that his failure to execute a written waiver established his intention not to waive his rights. Indeed, it is clear that a written waiver is not required under *Miranda v. Arizona*, 384 U.S. 436 (1966). What is necessary is only a waiver which is made "voluntarily, knowingly and intelligently." *Id.*, at 444. "Certainly the execution of that [waiver] form was not a condition precedent to any effective waiver. Nor do we deem its non-execution cogent evidence of misapprehension of the warnings." *United States v. McNeil*, 433 F.2d 1109, 1113 (D.C. Cir. 1969). See also *United States v. Cassino*, 467 F.2d 610, 620 n. 30 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). In fact, even where the defendant speaks voluntarily with agents after *refusing* (as OM did not) to sign a waiver, his statements are admissible. *United States v. Speaks*, 453 F.2d 966 (1st Cir.), *cert. denied*, 405 U.S. 1071 (1972); *United States v. Crisp*, 435 F.2d 354 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *Klingler v. United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969).

## **2. The seizure of evidence from the loft on August 1, 1973.**

The evidence presented at the suppression hearing established that on July 26, 1973 Secret Service agents obtained a search warrant for the sixth floor premises at 146 West 26th Street in Manhattan predicated upon the discovery of several thousand dollars in counterfeit Federal Reserve Notes in an air shaft in the building at points below the sixth floor (2/4/74 Tr. 39). At about 6:00 P.M., after announcing their purpose and the existence of a warrant, Agent Caputo, together with several other Secret Service Agents and Officers of the New York City Police Department (2/4/74 Tr. 4, 47) was admitted by Claudia Chong, a/k/a "Lady Harmony" to the sixth floor loft (2/4/74 Tr. 48).

After a search during which substantial evidence of counterfeiting activities was seized (see *supra*, pp. 5, 6), most of the agents left the premises. Two agents remained overnight to secure the loft because three heavy items could not be removed at that time: two printing presses and a vacuum table, weighing a total of about three tons (2/4/74 Tr. 11).

On July 27, 1973 the Secret Service had the locks changed on the loft, giving one key to the landlord and retaining another until the large items could be removed (2/4/74 Tr. 52). That same day an inventory listing items seized from the loft, including the presses and vacuum table, was prepared and filed with the United States Magistrate, together with the return on the search warrant. (2/4/74 Tr. 9).

On July 30, 1973 Agent Larry Sheafe returned to the Secret Service office after a vacation, and learned of the events of the previous week. As Agent in Charge of the New York counterfeiting section he immediately spoke with representatives of Santini Brothers, a commercial mover, in an effort to expedite removal of the printing presses and vacuum table. When he learned that the movers would be unable to act until about August 10th, Agent Sheafe agreed to visit the premises to see how the items could best be moved.\* (2/8/74 Tr. 5).

On the morning of August 1, 1973, Agents Sheafe, Caputo and Simon went to the sixth floor loft at 146 West 26th Street and observed the position of the two presses. Standing between the presses was a partition constructed of plywood and 2" by 4" wooden studs. One side of the partition extended from floor to ceiling; the other side extended

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\* Eventually the presses were dismantled by Santini Brothers on August 7th, and moved on August 8th (2/8/74 Tr. 8).



to a height of about four feet, thus making a "half-wall" on that side. (2/4/74 Tr. 15).

As Agent Sheafe went to inspect the freight elevator for size and capacity, he directed Agent Caputo to see whether the wooden partition could be removed to facilitate moving the large printing press. When Caputo looked into the space between the plywood sides, he noticed a roll of paper with impressions of counterfeit money on it. (2/4/74 Tr. 16). He also noticed that the space had been filled with concrete, some of which had not yet solidified. At that point Agent Caputo reached into the space, pulled out the paper he had seen, and showed it to Agent Sheafe. Sheafe himself looked into the wall and removed paper protruding from the concrete. The paper was a sheet of counterfeit Federal Reserve Notes. (2/4/74, Tr. 16; 2/8/74 Tr. 6). When Sheafe saw even more paper in the space, but was unable to reach it, he directed Agents Caputo and Simon to help him remove the plywood side of the wall to retrieve what appeared to be more counterfeit money. (2/8/74 Tr. 6, 7). When the sides were removed the agents found 57 printing plates, 64 negatives and over \$100,000 in counterfeit money, both cut and uncut, interspersed throughout the wall (2/8/74 Tr. 22). These items were seized, and a supplemental inventory was filed with the United States Magistrate the next day. (2/4/74 Tr. 24).

In his opinion, Judge Briant held that the Secret Service Agents had been on the premises lawfully on August 1st and that the seizure of evidence from the wall was justified because the agents had observed contraband in "plain view." (Memorandum and Order at 12). OM claims, as he did at trial, that the agents' intrusion was a warrantless search of the premises conducted in order to obtain more evidence from the loft. This view finds no support in the evidence adduced at trial or at the suppression hearing. Rather, it is clear that the agents were in the loft for a

valid purpose which did not require a new search warrant and that the recovery of evidence was a "plain view" seizure.

It is axiomatic that in order to sustain a seizure of evidence which was in "plain view," the Government must establish that the official who makes the seizure "had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). In this case, as Judge Briant found (Memorandum and Order at 12), Agents Sheafe, Caputo and Simon were at the loft, which they had secured by changing the locks, for the legitimate purpose of inspecting the printing presses and layout of the premises to determine how best to remove more than three tons of printing equipment which they had already seized pursuant to a valid search warrant (2/8/74 Tr. 5).

The agents who executed the warrant on July 26, 1973 were entitled to secure the premises to permit removal of the validly seized presses at a reasonable future time.\* See *United States v. Romano*, 203 F. Supp. 27 (D. Conn. 1962), *aff'd in part*, 330 F.2d 566 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965). Indeed, the right to seize carries with it the right of removal. *Stork Restaurant Corporation v. McCampbell*, 55 F.2d 687, 689 (S.D.N.Y. 1932). This is not a case in which the agents seized the premises without making an effort to remove the contraband. Compare *Mellet & Nichter Brewing Co., Inc. v. United States*, 296 Fed. 765 (E.D. Pa. 1923). Rather, as Judge Briant found below, the agents acted expeditiously within a reasonable time to effect removal of the printing presses and

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\* The necessity for exercising control over the premises until removal of the presses is obvious. Had the agents not done so they might have lost crucial evidence and would have been liable to the property owners for any damage or loss to property still on the premises Cf. *Harris v. United States*, 390 U.S. 234 (1968).

vacuum table, and "on August 1st, that period of time necessary to effect the seizure of the presses, and their removal had not expired." (Memorandum and Order at 11). Thus, there can be no question that the agents entered the loft on August 1st for a lawful purpose unrelated to a warrantless search for evidence, *Harris v. United States, supra*, and that they were legally on the premises at the time they discovered the evidence. Cf. *United States v. Titus*, 445 F.2d 577 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971); *United States v. Green*, 474 F.2d 1385 (5th Cir.), *cert. denied*, 414 U.S. 829 (1973).

Having established that the agents were lawfully on the premises, the Government produced evidence that the items seized were in plain view and were discovered inadvertently. Accordingly, Judge Brieant held that a "search" had not occurred in the loft on August 1st, but rather that the discovery of evidence was fortuitous. (Memorandum and Order at 12). It is well established that the discovery of evidence which is observed in plain view is not a search. *United States v. Titus, supra*; *United States v. Barone*, 330 F.2d 543, 544 (2d Cir.) *cert. denied*, 377 U.S. 1004 (1964). See *Coolidge v. New Hampshire, supra*; *Harris v. United States, supra*.

Moreover, when Agent Caputo, who was examining the wall in connection with the removal of the printing presses, observed what appeared to be counterfeit money in the space between the plywood sides of the wall, he was under an obligation to retrieve it, if possible. See *United States v. Brown*, 457 F.2d 731, 734 (1st Cir.), *cert. denied*, 409 U.S. 843 (1972). Obviously the agents were not required to close their eyes to what appeared to be contraband counterfeit currency and leave the paper in the wall. *United States v. McDaniel*, 154 F. Supp. 1, 2 (D.D.C. 1957), *aff'd* 255 F.2d 896 (D.C. Cir.), *cert. denied*, 358 U.S. 853 (1958). Once having seized portions of what was part of a roll of counterfeit money, the agents were justified in dismantling the wall to recover more of the roll, which still remained

in Agent Sheafe's sight but which he could not reach with **his hand**. (2/8/74 Tr. 20). The only practical way to reach that evidence was to tear down the wall. The discovery during this dismantling of counterfeiting plates and negatives, as well as \$114,000 in counterfeit currency, was purely fortuitous. While OM contends that the negatives and plates (as opposed to the roll of currency) were not in plain view and therefore not properly seized by the agents, that argument misses the point. It was undoubtedly lawful and necessary for the agents to dismantle the wall in order to recover the inaccessible paper which remained in plain view but which could not be reached. Having done so, they could hardly be expected to ignore the cache of contraband items thus uncovered. Indeed, the plates, the negatives, and the remainder of the currency *did* come into "plain view" when the wall was removed. That is not a search, as OM argues; it is an inadvertent discovery of additional items during a valid "plain view" seizure of the initial roll of counterfeit money\*

Moreover, though this is a question which the Court need not reach, the discovery of the counterfeit money and plates could be sustained on a wholly independent ground, even if it had been the product of a search on August 1. The Secret Service, as noted above, had searched the premises on July 26 pursuant to a valid search warrant. Because of the need to secure assistance in removing the print-

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\* The foregoing likewise disposes of OM's final contention that a plate maker found in the loft on August 1st was likewise seized in violation of his Fourth Amendment rights. Agent Caputo testified that the discovery of the plate maker occurred as the agents dismantled the wall. In order to reach the remainder of the wall, Agent Simon had to move cans of printing ink and other items which were piled on the floor. The plate maker was found on the floor beneath those items, next to the wall (2/4/74 Tr. 27). Agent Caputo's testimony remained firm under strenuous cross-examination (2/4/74 Tr. 58). The discovery of the plate maker clearly was inadvertent.



ing presses seized under the warrant, the premises had been secured by changing the locks. Since the securing of the premises resulted, albeit temporarily, in their "seizure" by the Government pursuant to a search warrant, a search of the wall while the premises were in Government control on August 1 could hardly have been more intrusive for Constitutional purposes than the lawful act of holding the premises in Government custody. See *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970). Moreover, it is uncontested that the agents could have torn down the wall on July 26 when they executed the search warrant, and there appears to be no Constitutionally significant reason why a further search of a portion of the premises while they were still in Government custody should be impermissible. See *United States v. Edwards*, — U.S. —, 42 U.S.L.W. 4463 (March 26, 1974).

## POINT II

**There was more than adequate evidence to sustain the jury's guilty verdict.**

OM contends that the evidence was insufficient to sustain his convictions. The contention is without substantial merit.\*

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\* OM also claims that the sufficiency of the evidence should be determined solely from the Government's case in which, although the rule in this Circuit is settled that when a defendant offers evidence, as OM did, all of the evidence in the record should be considered. *United States v. Tramunti*, Dkt. No. 74-1398 (2d Cir., July 12, 1974) slip op. at 4813; *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 n. 7 (2d Cir. 1973). OM urges a departure from this rule because he appeared *pro se*, but he cites no authority for his contention and neglects to mention that he defended himself at his own insistence while an attorney assigned to represent him remained at counsel table throughout the trial (3/22/74 Tr. 3-4). In any event, the Government's proof was more than adequate to take the case to the jury.

The Government's proof at trial established that the sixth floor loft, where the counterfeit money and counterfeiting paraphernalia was found, was maintained under the control of OM, who was observed there on a daily basis by the superintendent. The five women who used the premises besides OM were members of a group called the OM Lovers, which had the glorification and gratification of OM as its sole object. These women were held in complete thralldom by OM.

In the loft premises were printing presses which OM had purchased. A photograph of OM found on the premises showed him posing naked about to operate one of the presses. Shortly before the premises were searched by the Secret Service on July 26, OM directed the superintendent not to permit anyone to go to the loft without OM's express permission. As a result of the search by the agents on July 26 and their further discovery on August 1, inks, plates negatives and paper for the production of counterfeit money were found and seized. Also found was a quantity of partially completed counterfeit money and paper cut to currency size. OM's fingerprints were found on several of the counterfeit plates and his handwriting and fingerprints appeared on some of the currency-size paper.

After the raid by the Secret Service on the loft OM began to travel under aliases. At the time of his arrest several months later, OM was found to have handwritten notes in his possession concerning the obtaining of a visa to Mexico. After his arrest, OM told Agent Sheafe that he still had \$2,000 in counterfeit money which he offered to exchange for his freedom. Other evidence established that OM was short of money in the summer of 1973.

On this evidence alone the jury could have reasonably found that OM had possession, actual or constructive, of the counterfeit money and counterfeiting paraphernalia found in the loft. See *United States v. Sisco*, Dkt. No. 73-

2017 (2d Cir., May 10, 1974) slip op. at 3423-3424; *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973); *United States v. Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973); *United States v. Vasquez*, 429 F.2d 615, 617-618 (2d Cir. 1970). Moreover, the evidence offered by the defense could reasonably have been found by the jury to buttress the other evidence of OM's guilt. *United States v. Tramunti*, *supra*, slip op. at 4814. The defense was that the counterfeiting had been done by two men, identified only as "Rico" and "Gigi", whose purpose was to "frame" the OM Lovers. But apart from its inherent incredibility, this version of the facts was also substantially impeached by other evidence in the record. First of all, the defense case was put in by the testimony of the OM Lovers, whose loyalty to OM and possible criminal liability gave them powerful motives to fabricate. Second, the claims of innocence offered by the OM Lovers were inconsistent with OM's post-arrest statement, in which he said that Lady Lovelight had told him she had printed the money. Third, even on the defense version of the facts, the discovery of the counterfeit money and paraphernalia by the OM Lovers resulted not in notification of the authorities but in various more or less effective forms of concealment and destruction and in the flight of the OM Lovers. Fourth, Lady Virtue, at least, retained some of the counterfeit money and passed it, and she also testified that she believed *all* money was counterfeit.

OM's contention of insufficiency is based on *United States v. Van Fossen*, 460 F.2d 38 (4th Cir. 1972), in which a divided panel reversed, for insufficiency, a conviction in which the *only* evidence of guilt was the finding of Van Fossen's fingerprints on printing plates and negatives in a print shop where counterfeit currency was manufactured. Apart from the fact that there was a vigorous and persuasive dissent in *Van Fossen* by Judge Boreman, the important point is that there was far more evidence here than just OM's fingerprints on two counterfeit plates found in the wall. In addition, his prints and handwriting were

found on currency-sized paper uncovered in the office. Moreover, in contrast to Van Fossen, OM was the proprietor of the premises where the counterfeiting occurred and had complete control over the people who lived there. The printing press belonged to OM, and he had been photographed as he was about to use it. Finally, OM's criminal intent was proved by his flight after the Secret Service raid on the loft and his admission after arrest that he had \$2,000 in counterfeit money in his possession. In short, assuming the correctness of the majority opinion in *Van Fossen*, there was still more than sufficient evidence here to sustain OM's conviction. *United States v. Cuomo*, 479 F.2d 688, 694-695 (2d Cir.), *cert. denied*, 414 U.S. 1002 (1973).

### POINT III

**The conduct of the trial judge was fair and impartial and did not prejudice the defendant's case in any way.**

The defendant asserts that Judge Cannella's conduct of the trial was somehow prejudicial to the defense case. (Appellant's Brief at 21). OM mentions seven general areas of complaint on this score, in an effort to obtain reversal for "cumulative error." None of OM's arguments have merit.

#### **A. The "Broken Promise."**

OM claims that he had been "promised" by Judge Cannella that he would be allowed to recall Agent Caputo as his own witness but was denied the opportunity to do so. Actually, OM reserved his right to recall Caputo after he had testified for the Government (Tr. 300). When he asked to recall the agent, counsel for the Government sought an offer of proof (Tr. 459). OM indicated that Caputo would testify to his relationship with Lady Harmony on the night of the search in the loft and also to the disposition of



property seized there which was entirely unrelated to the counterfeiting case. (Tr. 461). When the Court pointed out that these matters were collateral as far as Caputo was concerned, OM agreed that he had no need for Caputo but would make his point through the testimony of Lady Harmony herself. (Tr. 463). He later did exactly that. The defendant was hardly a victim of a broken promise by the judge under those circumstances.

## **B. Alleged Frustration of the Defense Case.**

Secondly, the defendant argues that Judge Cannella "often both intimidated the defendant and his witnesses or alternatively made sarcastic, often very funny remarks whose entire effect was to ridicule the defendant and his followers and prejudiced the jury." (Appellant's Brief at 22). OM also contends that he was prejudiced the judge's questioning of defense witnesses "in a prosecutorial manner." (*Id.*) In support of his argument, the defendant offers no legal citation or analysis, but points to forty-five occasions in the transcript where he alleges judicial impropriety occurred.

Most of the instances of which the defendant now complains were occasions on which Judge Cannella was constrained to remind the *pro se* defendant and his witnesses that answers to questions had to be direct and responsive (Tr. 467, 468, 556-559, 595, 603-604, 626, 629-631, 649, 664, 681-682, 704). Moreover, on several occasions the trial Court was required to restrict the testimony to avoid repetition and irrelevancy. (Tr. 474, 476, 571, 615, 643, 670, 678). At other times Judge Cannella asked questions which obviously aided the defendant's presentation (Tr. 470, 620, 637), or which followed areas of inquiry which the defendant himself had begun. (Tr. 458, 549, 588, 641, 700). In none of these instances did the trial court overstep the bounds of judicial propriety. Judge Cannella's patient flexibility toward the defendant's unorthodox *pro se* representation insured that the trial was conducted without the

type of excesses which this Court has criticized in such cases as *United States v. Nazzaro*, 472 F.2d 302 (2d Cir. 1973). Indeed, it is clear in this case that the judge's interjection into the proceedings "was prompted by the district court's duty as more than a moderator to clarify ambiguous questions and testimony for the jury and to insure that the trial was fairly conducted." *United States v. Pellegrino*, 470 F.2d 1205, 1206 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

OM also complains that he was prejudiced at trial by the judge's advising three defense witnesses of their rights in the presence of the jury. (Tr. 485, 601, 680). There is no conceivable way in which this advice of rights could have prejudiced the defendant's case. All three witnesses were deeply involved in the same episode for which OM was on trial. Moreover, it is clear that their testimony was calculated to exonerate OM. Obviously, since all these witnesses testified anyway, the advice of rights aided the defendant's cause, because it would be apparent to the jury that the witnesses had no reluctance at all to testify, thus bolstering their credibility in the eyes of the jury.

### **C. Failure to Allow Hearsay Testimony.**

The defendant argues that the judge erroneously refused to permit a defense witness, Lady Harmony, testify to the contents of a conversation which she had with Agent Caputo. (Tr. 502, 503). Likewise, the Court would not permit Lady Inspiration to testify to a conversation which had occurred between her and the defendant. (Tr. 695). This exclusion of hearsay testimony was clearly within the Court's discretion, and was required by the law of evidence. No exception to the prohibition against admission of hearsay exists for either conversation.

#### **D. Interjection of Comments During The Government's Case.**

OM contends that "[d]uring the Government's case the Court consistently continued to interject humorous comments which prejudiced defendant's case and reduced an already strange trial in terms of appearance of parties and the fresh flowers that daily bedecked the defense trial to a joke." (Appellant's Brief at 22). The defendant offers only a wholesale array of twenty-two transcript citations as support for this argument.

While on occasion good humor will surface in any trial, it is clear in this case that Judge Cannella sought to restrict any humor to a minimum. The occasions of which OM now complains include those on which the Court restricted the opening statements of both parties to the facts (Tr. 12-14), or handled objections at a side-bar conference (Tr. 26, 249, 338). The defendant also finds fault with restriction of the direct testimony of a Government witness (Tr. 131) and the Court's efforts to insure the jurors' comfort (Tr. 176, 177). In addition, the defense labels as "humorous comments" Judge Cannella's counseling of the *pro se* defendant on how to pose proper questions (Tr. 93, 94, 276, 284, 355, 383). None of those incidents contain a humorous comment by the trial court.

In assessing the role of the trial Court in a criminal matter, it is important to recognize that a judge is "[m]ore than a moderator or umpire." *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960). Rather, he must insure that the facts are presented to the jury in a "clear and straightforward manner," and he must maintain an appearance of "impartiality and judicious detachment" at all times. *United States v. Nazzaro*, *supra*, 472 F.2d at 313. See *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973). In this case Judge Cannella was faced with the trial of a case which required personal patience

beyond that normally necessary in a Federal Court. The defendant not only insisted on appearing pro se but claimed to be the "Supreme Overlord" of the "New World". He presented a case based upon the testimony of the bizarre OM Lovers, whose devotion to OM was apparent. It was crucial for all parties that strict control be maintained over the proceedings, and that the defendant and his followers recognize that regardless of their opinion of the American legal system, the trial judge was in charge in the courtroom. Judge Cannella accomplished this task with characteristic poise, giving the defendant every opportunity to present his own case and to attack the Government's witnesses. Moreover, he permitted the witnesses to be addressed by their OM-given names, and allowed OM to keep fresh flowers on the defense table during the trial.\* It can hardly be said under those circumstances that the defendant was in any way prejudiced by the judge's conduct of the trial.

### **E. The Court's Charge.**

Finally, OM argues that he was prejudiced by Judge Cannella's charge to the jury. His first complaint concerns the judge's "commenting and charging the jury on the difference in race between the defendant and his 'girls'." (Tr. 825). The Court did mention the race of the defendant and his witnesses, in the following context:

"In coming to a determination of this case, if you find that you are influenced in some way and have some natural prejudice against people who go around nude or have religious beliefs similar to him or his color or the fact that his girls and he are of a different color or any of these things, you divorce that from your mind, it has nothing to do with this case.

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\* Apparently the OM Lovers' incense-burning in the courtroom was beyond even Judge Cannella's patience (Tr. 176, 177).



and you swore to me when you were picked as jurors, you were going to decide this case on the evidence here and the law as given to you by the Court, and I tell you now, focus on these two particular charges, period. These other things are not to enter into your judgment either by way of sympathy or by way of bias." (Tr. 825, 826).

OM now claims that this was improper. However, the fact that he raised no objection \* at trial on this point is strong evidence that the Court's statement could have had no prejudicial impact. See *United States v. Rose*, Dkt. No. 73-2760 (July 10, 1974), slip op. at 4798-4799. Moreover, the "religious" and sexual mores, which OM and his followers had paraded before the jury throughout the trial, were of a type likely to excite antipathy among all but the most free-thinking jurors. In such circumstances, a brief cautionary instruction to ignore some of OM's customs which, rightly or wrongly, were most likely to cause offense to the jury was clearly within the Court's discretion. See *United States v. Grant*, 494 F.2d 120, 122 (2d Cir. 1974).

OM's other claim about the Court's charge is that the instruction on constructive possession was improper. However, the portion of the Court's instructions cited for this proposition was a summary by the Judge of the Government's contentions, not a charge defining constructive possession.

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\* Objections to other portions of the charge were made by both OM and his counsel (Tr. 838-841). Moreover, in addition to handling all procedural and "technical" matters throughout the pendency of the charges against OM, as well as at trial, appointed counsel also conducted portions of direct and cross-examination at the suppression hearing and at trial. Cf. *United States v. Justice*, 431 F.2d 30, 32 (5th Cir. 1970); *United States v. McIntosh*, 426 F.2d 1231, 1234 (D.C. Cir. 1970).

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

PAUL J. CURRAN,  
*United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America.*

T. BARRY KINGHAM,  
JOEL N. ROSENTHAL,  
JOHN D. GORDAN, III,  
*Assistant United States Attorneys,  
Of Counsel.*







AFFIDAVIT OF MAILING

State of New York     )  
County of New York    )

*T. BARRY KINGHAM* being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District of  
New York.

That on the *12<sup>th</sup>* day of *August, 1974*  
he served a copy of the within *Brief*  
by placing the same in a properly postpaid franked  
envelope addressed:

*BENJAMIN J. GOLUB, Esq*  
*10 EAST 40<sup>th</sup> STREET*  
*New York, N.Y. 10016*

And deponent further says that he sealed the said en-  
velope and placed the same in the mail drop for  
mailing the United States Courthouse, Foley  
Square, Borough of Manhattan, City of New York.

*T. Barry King*

Sworn to before me this

*12<sup>th</sup>* day of *August, 1974*

*Alma Hanson*

ALMA HANSON  
NOTARY PUBLIC, State of New York  
No. 24-6763450 Qualified in Kings Co.  
~~Certificate filed in New York County~~  
Commission Expires March 30, 19 *76*